

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 02-0081 CSET
CONTROLLED SUBSTANCE EXCISE TAX
FOR TAX PERIOD: 2001

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Issue

Controlled Substance Excise Tax: Imposition

Authority: IC 6-7-3-19 (2), IC 6-8.1-3-1, IC 6-7-3-5, IC 6-7-3-13, Fifth Amendment to the United States Constitution, Bryant v. State, 660 N.E. 2d 290 (Ind. 1995).

The taxpayer protests the imposition of the controlled substance excise tax.

Statement of Facts

On August 17, 2001, the taxpayer picked up a box of controlled substances at the post office. The taxpayer's county prosecutor sent the Indiana Department of Revenue, hereinafter the "department", a letter requesting that the department institute a controlled substance excise tax investigation. The Indiana Department of Revenue issued a Record of Jeopardy Finding, Jeopardy Assessment, Notice and Demand on January 7, 2002 in a base tax amount of \$170,236.00. The taxpayer protested the assessment. At the request of the taxpayer's representative, the Letter of Findings was based upon the documentation in the file. Further facts will be provided as necessary.

Controlled Substance Excise Tax: Imposition

Discussion

The department can only commence an investigation into and collection of controlled substance excise tax after it is notified pursuant to the terms of IC 6-7-3-19 (2) as follows:

. . . in writing by the prosecuting attorney of the jurisdiction where the offense occurred that the prosecuting attorney does not intend to pursue criminal charges of delivery, possession, or manufacture of the controlled substance that may be subject to the tax required by this chapter.

In this case, the department received this notification in writing from the taxpayer's county prosecutor in the following words:

This letter is a request for you to continue the investigation of the above entitled cases for the Indiana State Department of Revenue. Both of our cases have been closed. Attached, you will find a copy of the plea agreement in these cases.

Pursuant to IC 6-8.1-3-1, the department's receipt of the prosecutor's request for an investigation transferred to the department the "primary responsibility for the administration, collection, and enforcement of the listed taxes."

After receipt of the prosecutor's letter, the department investigated the taxpayer's case. As a result of the investigation, the department imposed controlled substance excise tax on the taxpayer's possession of anabolic steroids in Indiana pursuant to IC 6-7-3-5. The assessment was issued as a jeopardy assessment as required at IC 6-7-3-13.

The department later received a second letter from the county prosecutor requesting that the department discontinue the collection of the controlled substance excise tax from the taxpayer. The department considered the prosecutor's request and determined to proceed with the collection of the tax.

The prosecutor and the taxpayer negotiated another plea agreement after the issuance of the jeopardy assessment. Pursuant to the new plea agreement, the defendant pled guilty on April 26, 2002 to each of the counts of possession of anabolic steroids. That agreement reads in part as follows, "no further jeopardy shall attach to the defendant in this case, under counts 1,2,3,4,5 and 6. Including but not limited to the tax typically applied in these cases."

The taxpayer argues that the department's continued efforts to collect the controlled substance excise tax violates the taxpayer's constitutional protection against double jeopardy guaranteed in the Fifth Amendment to the United States Constitution.

The Indiana Supreme Court considered this double jeopardy issue in Bryant v. State, 660 N.E. 2d 290 (Ind. 1995). In that case, the police searched Bryant's home and found a marijuana growing operation. The department issued a jeopardy assessment of the controlled substance excise tax in August 1992. Bryant was convicted of growing, cultivating and possession of marijuana in criminal court in April 1993. This conviction placed Bryant in criminal jeopardy based upon the same possession of the marijuana as the jeopardy assessment.

The Fifth Amendment to the United States Constitution prohibits the placing of any person in jeopardy twice for the same offense. The issue the Court had to decide was which jeopardy would be effective and which jeopardy would be vacated. The Court decreed that it must be determined based on a calendar determination of which jeopardy came first. In the Bryant case, the controlled substance excise tax jeopardy was previous in time to the criminal jeopardy. Therefore the criminal court incorrectly convicted Bryant and the criminal conviction was vacated.

This is identical to the taxpayer's situation. The controlled substance excise tax jeopardy assessment was issued prior in time to the plea bargain wherein the taxpayer pled guilty and was placed in jeopardy for the criminal actions. The first jeopardy, the controlled substance excise tax jeopardy, was the constitutionally allowed jeopardy. The criminal jeopardy, the April 26, 2002 plea agreement, was barred by the Fifth Amendment to the United States Constitution because it placed the taxpayer in jeopardy a second time for the same offense.

The prosecutor and judge had no further authority over the matter after the department issued the jeopardy assessment.

The taxpayer clearly possessed the box of anabolic steroids when he picked it up at the post office. Therefore, the controlled substance excise tax was properly imposed.

Finding

The taxpayer's protest is denied.